SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
SEP 1 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 518

JOHN J. OLING, DAVID J. LANDRY, on behalf of themselves and all other "second officers" in the employ of United Air Lines, Inc. similarly situated, *Petitioners*

v.

AIR LINE PILOTS ASSOCIATION, and UNITED AIR LINES INC., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on June 4, 1965.

OPINION BELOW

The opinion of the court below, printed in Appendix A hereto (*infra*, p. 1a), is reported in 346 F. 2d 270.

JURISDICTION

The judgment of the court below was entered on June 4, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

The court below ruled that a suit brought by Petitioners in a federal court seeking to remedy violations of the Railway Labor Act was a "collateral attack" upon an order issued by the Civil Aeronautics Board (hereinafter CAB) in connection with a merger proceeding, and could not be entertained by the court even if the subject matter of the suit is not within the exclusive jurisdiction of the CAB. The question presented is:

Where the subject matter of a suit in a federal court alleging violations of the Railway Labor Act involves, in some respects, matters which are also cognizable by the CAB in a merger proceeding, are the federal courts prevented from exercising their normal Railway Labor Act jurisdiction by virtue of the fact that plaintiffs in the court suit had first invoked the jurisdiction of the CAB with respect to the limited matters within its jurisdiction?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are set forth in Appendix B (*infra*, pp. 15a-17a).

STATEMENT

Petitioners comprise a group of about 233 employees of Respondent United Air Lines Inc. (hereinafter "United") who are classified as "second officers", a classification covering those flight deck crew members who perform the work commonly known as flight engineering. They brought this suit on September 4, 1964 in the U. S. District Court for the Northern Division of Illinois as a class action alleging that United and Respondent Air Line Pilots Association (hereinafter "ALPA") had violated the Railway Labor Act (45 U.S.C.A. 151, et seq.), and seeking injunctive relief and damages.

The circumstances out of which this litigation arose have their origin in a long struggle between ALPA and Flight Engineers' International Association (hereinafter "FEIA") for the right to represent flight engineers in the employ of United. Petitioners comprise only a portion of the second officers employed by United. Prior to 1961, Petitioners, together with all other second officers of United, had been represented by FEIA in a bargaining unit confined to flight engineers. Petitioners had been members and officers of FEIA. ALPA had been the collective bargaining representative of the pilots (or "captains") and co-pilots (or "first officers"). For many years ALPA had sought to gain the right also to represent the flight engineers. This effort was openly and vigorously opposed by Petitioners. (P.A. 8, 121-123)[1]

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[1] "P.A." refers to the Appendix filed by Petitioners ("Plaintiffs-Appellants") in the court below. In the factual statements made herein cognizance is taken of the fact that the court below sustained a motion to dismiss the complaint, for lack of jurisdiction and for failure to state a claim and of the well established rule that in such circumstances material factual allegations of the complaint must, for the purposes of this proceeding, be taken as admitted. *Conley* v. *Gibson*, 355 U.S. 41.

In January of 1961, the National Mediation Board permitted a representation election to be held in which —over the opposition of Petitioners and FEIA—flight engineers were requpired to vote in a single unit together with the more numerous pilots and co-pilots, with the result that ALPA was selected and certified as the exclusive bargaining representative for all of United's pilots, co-pilots, and flight engineers in a single bargaining unit of "flight deck crew members" (P.A. 122-123). There is no provision in the agreements thereafter executed between ALPA and United requiring membership in ALPA as a condition of employment, and Petitioners have refused to become members of ALPA. (P.A. 5, 150)

At the heart of the complaint in this case is the claim that from the time when ALPA took over the right to bargain for Petitioners it embarked upon a program, in which United aquiesced, to discriminate against Petitioners because of their known allegience to FEIA, their known opposition to the program and policies of ALPA, and their refusal to become members of ALPA. (P.A. 8) The principal area in which such discrimination manifested itself involved the very basic problem of merging the seniority of the two formerly separate groups of pilots and flight engineers. From the beginning Petitioners had urged upon ALPA and United that since the National Mediation Board had ruled that these two groups now comprise a single bargaining unit of flight deck crew members, all flight deck employees should be credited with all of the time they have flown as a flight deck crew member, with the concomitant right to exercise their seniority so computed to bid for any one of the three flight deck crew jobs for which they are qualified. (P.A. 4-5, 126-127, 158-159) However, from the beginning ALPA made

it clear that it had no intention of following that principle; but intended instead to discriminate against Petitioners by placing them arbitrarily at the bottom of any seniority list from which the jobs of captains and first officers would be bid (P.A. 128-129, 162-163); and this, as the complaint alleges, in order to punish Petitioners for their opposition to ALPA. (P.A. 8)

Meanwhile, and before the problem could be resolved, on April 3, 1961, the CAB entered an order approving the merger of United and Capital Airlines Inc. (hereinafter Capital) under Section 408 of the Federal Aviation Act. (49 U.S.C.A. 1378). On Capital ALPA had been the bargaining representative of both the pilots and the flight engineers. The CAB attached certain conditions to approval of the merger, including the requirement that: ". . . provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected . . ." (P.A. 123, 35-36).

The specific details of the procedures by which ALPA and United resolved the matter of integrating seniority are not germane to the instant petition. Suffice it to state that Petitioner's worst fears of being discriminated against because of their opposition to, and refusal to join ALPA, were realized. Petitioners were denied any real voice in the determination of the policy to be applied; indeed ALPA designated as the principal spokesmen for the United second officers, certain employees who had supported ALPA in its efforts to supplant FEIA and had already voiced their opposition to the claim of Petitioners that all flight deck crew members should be credited with all of their

flight deck time. (P.A. 124-126, 130) And when ALPA finished the process by which they submitted the issues to a strictly intra-union "arbitration" before two boards, in neither of which proceedings United or Petitioners were parties, Petitioners wound up at the bottom of the seniority list from which the jobs of captains and first officers are bid. They were placed substantially behind hundreds of others who had much less flight deck crew service, who had no greater qualifications for those jobs, and who were distinguished from Petitioners only in having been—as Petitioners refused to be—loyal supporters of ALPA. (P.A. 5-6, 128-140, 145-146)

Thereafter, as the complaint alleges, United accepted, without challenge and without any real bargaining, the resolution of seniority that ALPA had dictated, thereby delegating to ALPA complete control over the future job rights and security of Petitioners. (P.A. 6-8). What is more, as the complaint further alleges, in return for having been delegated unfettered control over seniority, ALPA acting as the exclusive bargaining representative of Petitioners, accepted economic terms and conditions far inferior than ALPA would otherwise have agreed to. (P.A. 7)

Believing as they did that the discriminatory conduct by ALPA and United constituted a violation of the Railway Labor Act, Petitioners prepared to bring suit in a federal court. Before doing so, however, Petitioners deemed it necessary to avoid any possible claim that they had failed to exhaust any administrative remedies available to them. They recognized that under the terms of the order in which the CAB had approved the merger of United and Capital the CAB had reserved jurisdiction to amend, modify

or add to the labor protective provisions of said order "as circumstances may require." Accordingly, on November 27, 1963 Petitioners filed a petition with the CAB asking the Board to re-open the record in the merger proceedings for the purpose of taking evidence in support of the claim that seniority had not been integrated in the fair and equitable manner required by the terms of the order approving the merger. The petition asked the CAB, after hearing, to set aside the seniority list, and to determine Petitioners' length of service in a manner which credited Petitioners with their full flight deck crew service. That was the central thrust of said petition; it did not seek anything like complete relief against the discrimination visited upon Petitioners (such as the failure of ALPA to bargain on economic terms without discrimination, or the relinquishment by United of its responsibilities in bargaining concerning seniority); it did not ask for any specific relief or future protection against the discrimination practiced by ALPA, and it did not seek damages—all such matters being beyond the jurisdiction of the CAB in the merger proceeding. (P.A. 99-106, 148-149)

No hearing was held by the CAB on that petition. On April 24, 1964, the Board dismissed the petition. (P.A. 149-150, 106-115) The basis for the refusal of the Board to reopen the record as requested in the petition is best expressed in the final paragraph of the Board's decision:

> "In sum, upon a consideration of the pleadings submitted by petitioners we find no basis for concluding that the seniority lists in question were not integrated in a fair and equitable manner in conformity with the requirements of Section 3 of the Labor Protective Provisions of the United-

> Capital merger order. Where, as here, the carrier and the duly certified representative of the petitioners reached agreement by collective bargaining procedures on a seniority list, and where, as here, the agreement itself conforms to the list resulting from the decision of impartial arbitrators, we find no basis for reopening the record of this case." (P.A. 114-115)

And this refusal of the CAB to set aside the seniority list where the list had been agreed to by the carrier and the authorized collective bargaining representative, was perfectly consistent with the general approach the CAB has taken to such problems—i.e. to leave it to the parties if possible—as is expressed in the following generalization in the CAB decision in this matter:

> "Although the Board has legal power to direct the precise manner in which the individual seniority lists should be merged, we have consistently taken the position that it is more desirable that this task be accomplished by those directly concerned, the employee groups and the carrier, either by agreement or arbitration." (P.A. 111-112)

Having exhausted the limited administrative remedy available, and now addressing themselves to the larger problem of obtaining future protection against the general discriminatory conduct by ALPA and United—going far beyond the matter of seniority as such—Petitioners filed the instant complaint in a federal district court. The complaint (P.A. 3-10) alleges violations of the Railway Labor Act by both ALPA and United generally falling into the following categories: (1) The claim that ALPA violated the Railway Labor Act by failing in its duty of fair representation by discriminating against Petitioners because of their opposition to ALPA and refusal to join that organization;

and the concomitant claim that United violated the Act by entering into agreements with ALPA knowing that those agreements were the products of invidious discrimination against Petitioners; (2) The claim that the discrimination against Petitioners unlawfully encouraged membership in ALPA and interfered with their rights under the Railway Labor Act; and (3) The claim that United violated the Railway Labor Act by delegating to ALPA complete control over seniority, particularly where such delegation was in return for ALPA's agreement to take less in wages and working conditions for Petitioners than they would otherwise have been entitled to (P.A. 6-8). The complaint sought damages and injunctive relief which was by no means limited to setting aside the seniority list; but which would secure protection for the future against the continuance by ALPA, in the conduct of its functions as bargaining representative, of any unlawful discrimination against Petitioners.[2]

Respondent United thereafter filed a Motion To Dismiss (P.A. 15-16) on the ground that the district court

[2] Thus, the prayer for relief asked the court, *inter alia*:

"1. To issue an order enjoining ALPA from discriminatintg against plaintiffs in the performance of its representation functions, and directing ALPA to represent plaintiffs as their collective bargaining agent fairly and without discrimination based upon irrelevant or invidious considerations;

• • •

3. To issue an order enjoining ALPA and United from encouraging membership in, or activities on behalf of, ALPA or any other labor organization, by discriminating against them in any manner whatever in regard to tenure of employment or any term or condition of employment, including seniority status and bidding rights;

4. To issue an order enjoining ALPA and United from interfering with, restraining, or coercing plaintiffs in the exercise of their rights under the Railway Labor Act . . ."

was without jurisdiction and the complaint failed to state a claim upon which relief could be granted. On November 16, 1964 the district court granted the motion without any opinion. (P.A. 210)

On appeal, the court below affirmed the order of the district court dismissing the complaint. In essence, the court below concluded that the action instituted by Petitioners could not be entertained by the district court because it was a "collateral attack" upon the April 24, 1964 order of the CAB.

It is most important to note that the court below reached this conclusion even on the assumption that the matters covered by the instant complaint were *not* within the exclusive jurisdiction of the CAB. The court states that, having concluded that the instant complaint was a "collateral attack" upon the April 24, 1964 order of the CAB:

> ". . . we do not reach the issue as to whether the CAB had exclusive jurisdiction, as argued by defendants, or concurrent jurisdiction, as argued by plaintiffs. In any event, its jurisdiction was invoked and pursued by plaintiffs to the point of an adverse decision, and they failed to seek relief therefrom by a review in the manner provided by Congress." (*Infra,* p. 14a)

The court below emphasizes the fact that Petitioners had not appealed the April 24, 1964 order of the CAB to a Court of Appeals in accordance with Section 1006 of the Federal Aviation Act (29 USCA 1486), *infra,* p. 17a. However, it goes without saying, and was surely recognized by the court below, that if the instant complaint was really a "collateral attack" upon the CAB order it would not have been any less so if brought *after* a direct appeal from the CAB order to a Court

of Appeals. The decision of the court below surely cannot be read as suggesting that an administrative order may be collaterally attacked by a suit in a district court provided that the plaintiff first seeks direct judicial review of the administrative order before instituting the suit.

The decision below must, therefore, be read as interpreting Section 1006 of the Federal Aviation Act as requiring the conclusion that *even where the matter is one over which the CAB and the federal courts have concurrent jurisdiction* a party who elects to first proceed before the CAB is not merely exhausting his administrative remedies; he has made an election which exhausts *all* of his remedies. Having "invoked" the jurisdiction of the CAB, he may not thereafter file suit in a federal court under any statute which would otherwise have given the court independent jurisdiction over the matter. His *only* recourse is to appeal from the CAB order if he has failed to obtain relief from the CAB.

In the context of the instant case, the ruling below means that where plaintiffs in a suit in a federal court alleging violation of the Railway Labor Act have first elected to seek relief from the CAB as to those limited aspects of their claims over which the CAB has jurisdiction, and are denied that relief by the CAB, they may not thereafter file suit in the federal court.

REASONS FOR GRANTING THE WRIT

1. The decision below establishes a new rule, requiring an election between administrative and judicial remedies, even where administrative and judicial jurisdiction is concurrent, which rule is directly contrary

to the principles frequently announced by this Court, and most recently reaffirmed in *United States* v. *Philadelphia National Bank*, 374 U.S. 321.

The complaint in the instant case placed before the district court questions concerning the enforcement of Sections 2, First, Third & Fourth of the Railway Labor Act (*infra*, p. 15a) which, under decisions of this Court, have long been established as being properly within the jurisdiction of the federal courts.[3] The decision below does *not* hold that in this instance the federal courts were ousted of jurisdiction because the subject matter of the complaint was within the *exclusive* jurisdiction of the CAB. Among other things, such a conclusion would have been contrary to several clear pronouncements by the CAB itself to the effect that to the extent it has any jurisdiction with respect to Railway Labor Act matters its jurisdiction is concurrent with, and not exclusive of, that of the federal courts.[4] To the court below it makes no difference

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[3] On the matter of federal court enforcement of the duty under the Railway Labor Act to represent all employees without invidious discrimination see, e.g. *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192. On the matter of the jurisdiction of federal courts to enforce the general prohibitions in the act against interference and coercion see, e.g. *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515; *Texas & N.O.R. Co.* v. *Brotherhood of Railway Clerks*, 281 U.S. 548.

[4] In 1959 the CAB approved a merger of Delta Air Lines and Chicago and Southern Air Lines, attaching as a condition that seniority be merged in a "fair and equitable" manner. After ALPA and the surviving carrier had negotiated a resolution of the seniority merger, a group of pilots filed a "Petition for Revision and Protest" with the CAB challenging the seniority integration. The CAB rejected the petition on its merits; but made the following observation concerning the relationship of its decision to any

whether or not the jurisdiction of the CAB is exclusive; it is sufficient that the CAB has jurisdiction; and the Petitioners, having invoked that jurisdiction, they

contemplated action in the federal courts under the Railway Labor Act:

> "A final comment is in order. The gravamen of petitioners' complaint, as we understand it, is that ALPA, in resorting to alleged arbitrary methods in accomplishing a proposed integration of the seniority lists, and Delta, in failing to assume its share of the responsibility for integration of the seniority lists, engaged in unlawful discrimination. *We take no position on whether petitioners have a cause of action cognizable by the courts.* We note that Delta in its motion to dismiss takes the position that petitioners' 'right of action—if any did ever exist—was in court, and not before the CAB. This has been made clear by the Federal courts, acting in dissimilar but related matters.' [Footnote citing *Steele* v. *Louisville and Nashville Ry. Co.*, 323 U.S. 192 (1944)] We further note that petitioners in their answer do not disagree that they may have a right of action in the courts but that they state, 'However, here we believe that it is patently clear that the Board has primary jurisdiction, and that petitioners are obligated to pursue their administrative remedies, before resort to court action.' *To the extent that petitioners may have been obligated to pursue their administrative remedies before this Board before resorting to any court action they may have in mind, it would appear that any such obligation was fulfilled by the filing of the present petition.*" *(In the matter of Petition for Revision of and Protest Against Integrated Seniority List of Delta-C&S Air Lines, Inc.*, CAB Order No. E-14403, August 31, 1959, p. 6-7, Emphasis added.)

There is a provision of the Federal Aviation Act under which the jurisdiction of the Board with respect to Railway Labor Act matters is broader than it is in Section 408 merger proceedings. Section 401(k)(4) of the Act (49 U.S.C. 1371(k)(4)) states: "It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with [The Railway Labor Act]." This provision was not invoked in the instant case because, among other reasons, there is no basis for obtaining relief against a *union* under this provision and such relief is essential to remedy the discrimination suffered by Petitioners in this case. However, it

are precluded from invoking the jurisdiction of the federal district courts.

Plainly, the jurisdiction of the CAB in the United-Capital merger proceedings brought under Section 408 of the Federal Aviation Act was confined—so far as is here relevant—to determining whether the seniority of the United and Capital employees had been merged in a fair and equitable manner. That is all the petition which the Board dismissed by its order of April 24, 1964 sought to have the CAB consider. No one could possibly contend that in any aspect of its approval of the merger the CAB had undertaken to supervise the enforcement of the Railway Labor Act in all of its broad aspects. A process of negotiations fully in conformity with the Railway Labor Act could have resulted in a seniority merger that was not viewed by the CAB as "fair and equitable", and the converse could equally well be true. And, as we have seen, for the CAB the test of whether the seniority merger was "fair and equitable" is really whether it has been

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must be noted that even in the application of this provision the CAB has recognized that its jurisdiction is no more than concurrent with that of the Railway Labor Act jurisdiction of the federal courts. Referring to the relationship between a CAB proceeding under this provision and pending federal court litigation under the Railway Labor Act, the CAB has said in a recent case:

> "Under 401(k)(4) the Board has an interest separate and distinct from the parties to insure compliance with the Railway Labor Act as necessary for the interest of the public .... The Supreme Court has held that where the courts and a Federal Administrative Agency have *concurrent jurisdiction* to enforce a Federal statute there is no reason why proceedings in the two forums should not proceed simultaneously. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948), reh. denied, 334 U.S. 839 (1948)" (*Flight Engineers' International Association* v. *Eastern Air Lines, Inc.*, CAB Order No. E-19923, August 19, 1963, Emphasis added)

deemed acceptable to the carrier and the employee representative, and not whether the Railway Labor Act has been violated.

Petitioners recognize that under Section 1006 of the Federal Aviation Act (*infra,* p. 17a) they could have appealed from the April 24, 1964 Order of the CAB refusing to reopen the record in the merger proceeding. But it must surely be plain that there was nothing to appeal from. Petitioners do not quarrel at all with the right of the CAB to determine that it will not go behind the agreement made by the authorized representatives of the employees in determining whether the seniority integration was "fair and equitable"; and that would have been the only possible issue in an appeal, and they have never suggested, in any aspect of the instant suit, that their purpose in this suit is to attack that determination by the CAB.

But, as already noted above, the decision below, by relying as it does on the principle of "collateral attack", stands for the basic proposition that Petitioners had *no other remedy* but to appeal from the CAB Order of April 24, 1964. Having elected to proceed before the CAB, says the court below, Petitioners may not now attempt to remedy the Railway Labor Act violations (even those never brought to the attention of the CAB; even those the CAB had no jurisdiction to remedy) by suit in the federal district court.

It is this basic proposition, which is at the foundation of the decision below, that squarely conflicts with decisions of this Court, as well as Courts of Appeals, on the principles to be applied where administrative agencies and the federal court have concurrent jurisdiction.

Where this Court has found—as it frequently has—that certain matters are within the concurrent jurisdiction of administrative agencies and the federal courts, it has sanctioned the institution and prosecution of both proceedings *simultaneously.* Such was the situation in *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, involving a proceeding before the Federal Trade Commission and a suit in the federal court under the Sherman Act. The decision of this Court in that case cannot be squared with any rule limiting the parties to the selection of one or the other tribunal and an appeal therefrom. It will be noted that the CAB has itself specifically accepted the rule of *Cement Institute* as the appropriate approach on the question of the relationship between its jurisdiction and that of the federal courts with respect to Railway Labor Act matters. (*Supra,* fn 4, p. 14)

Where the jurisdiction of administrative agencies and the federal courts is concurrent, there are circumstances in which the doctrine of "primary jurisdiction" requires resort to the administrative agency before instituting court action. If it be assumed that on the matters covered by the instant complaint the CAB had "primary jurisdiction", the decision of the court below conflicts directly with the application of that doctrine by this Court in *United States* v. *Philadelphia National Bank, supra.* In that case, two large banks had proposed to merge. Pursuant to the Bank Merger Act of 1960, the banks obtained permission to consolidate from the Comptroller of the Currency. In granting his approval of the merger the Comptroller disregarded adverse recommendations of the Department of Justice as to the effect of the merger upon competition. The day following the Comptroller's decision, the Department of

Justice sued in a federal court to enjoin the merger, alleging violation of both the Clayton Act and the Sherman Act. The District Court declined to issue the injunction. On appeal, this Court reversed and directed that judgment be entered enjoining the merger. On the issue of "primary jurisdiction" this Court said in terms that are directly applicable to the instant case:

> "We note, finally, that the doctrine of 'primary jurisdiction' is not applicable here. That doctrine requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme. See *Far East Conference* v. *United States,* 342 U.S. 570; *Great Northern R. Co.* v. *Merchants Elevator Co.,* 259 U.S. 285; Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436, 464 (1954). Court jurisdiction is not thereby ousted, but only postponed. See *General Am. Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U.S. 422, 433; *Federal Maritime Bd.* v. *Isbrandtsen Co.,* 356 U.S. 481, 498-499; 3 Davis, Administrative Law (1958), 1-55. Thus, even if we were to assume the applicability of the doctrine to merger-application proceedings before the banking agencies, the present action would not be barred, for the agency proceeding was completed before the antitrust action was commenced. Cf. *United States* v. *Western Pac. R. Co.,* 352 U.S. 59, 69; *Retail Clerks Int'l Assn.* v. *Schermerhorn,* 373 U.S. 746, 756." (374 U.S. at 353, footnotes omitted)

This Court similarly noted in *General American Tank Car* v. *El Dorado Terminal Co.,* 308 U.S. 422, which it reaffirmed in *Philadelphia Bank,* that:

> "When it appeared in the course of the litigation that an administrative problem, committed to the

> Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal, but . . . the cause should be held pending the conclusion of an appropriate administrative proceeding." (308 U.S. at 433)

Courts of Appeals have likewise applied this rule. See, for example: *S.S.W. Inc.* v. *Air Transport Association of America,* 191 F. 2d 658 (C.A. D.C.), cert. denied, 343 U.S. 955, which Petitioners submit conflicts with the decision below in a case specifically involving the Federal Aviation Act.

In the instant case the administrative agency was given an opportunity to exercise whatever limited jurisdiction it had on the issues involved before suit was brought in the federal court. It refused to take any evidence on the issue of the seniority merger, preferring to follow the rule that the seniority merger was "fair and equitable" if it satisfied the parties who had achieved it through collective bargaining. To say that the consequence of having gone to the CAB is that Petitioners were left with no means of vindicating the very broad denial of rights under the Railway Labor Act covered by their complaint other than to appeal from the CAB order dismissing their petition is to read into the "primary jurisdiction" principle something the decisions of this Court will not permit.

The decision below, it should also be noted, ignores completely Section 1106 of the Federal Aviation Act (*infra,* p. 17a) a "savings clause" in which Congress has made it clear that the remedies available under the Act are "in addition" to all other "remedies now existing at common law or by statute." To that extent,

the decision below is also in conflict with the decision of this Court in *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84, where the Court, in giving effect to a similar clause in the legislation governing the Interstate Commerce Commission, said:

> "Those who contend that no judicial remedy is available place much weight on the fact that, as we have said, the Interstate Commerce Commission has primary jurisdiction in routing practices. . . . To say, however, that such primary jurisdiction compels the conclusion that the courts are without power to award damages in every instance where the Commission may not award reparations by no means follows." 371 U.S. at 88.

The decision below not only is in conflict with the foregoing decisions of this Court, it misapplies and extends the decision of this Court (on which principal reliance is placed by the court below) in *Whitney National Bank* v. *Bank of New Orleans & Trust Co. et al*, 379 U.S. 411. That case involved a suit to enjoin the Comptroller of the Currency from issuing a certificate of authority for a new bank. However, the bank in question had been established as part of a holding company plan, and, as such, required approval of the Federal Reserve Board. That Board had granted approval, and an application for judicial review of that determination by the Board was pending when the lawsuit against the Comptroller was filed. This Court concluded that "the thrust of respondents' complaint goes to the organization of Whitney-Jefferson by the holding company rather than to the authority of Whitney-Jefferson to do business." The Court, upon a review of the applicable statute, concluded that on the matter of the organization of the bank by a holding company the Federal Reserve Board had "*original*

exclusive jurisdiction." That aspect having been approved by the Board, the permission to open the bank for business must be "acted upon routinely" by the Comptroller, and an attack upon the Board's approval of the holding company operation could only be made by an appeal from the decision of the Board.

To apply this decision, as the court below did, is to completely misread what this Court intended the decision to stand for, and to endow the CAB with jurisdiction over Railway Labor Act violations for which there is no statutory support, which the CAB has itself disavowed, and which conflicts with the principles this Court has established.

2. The issue presented in this petition is of far reaching importance in the administration of the Federal Aviation Act and the Railway Labor Act, and, additionally, poses a basic question in the relationship between administrative and judicial jurisdiction which merits the attention of this Court in the exercise of its supervisory powers.

As this Court is aware, ever since the decision in *United States et al* v. *Lowden et al.,* 308 U.S. 225, it has been the regular practice of the Interstate Commerce Commission (in the case of railroad and motor carrier employees) and the CAB (in the case of airline employees) to condition the authority granted by these agencies to carriers to engage in mergers, consolidations, and similar reorganizations upon the provision of conditions for the protection of employees affected. Technological and other organizational changes, occuring now and certain to accelerate in the future, in these basic transportation industries will most certainly increase the occasions in which these problems will come before these agencies. Hundreds

of thousands of employees are directly involved, and they will be directly affected by the rule announced by the court below. That rule would compel them, when faced with the problem of vindicating their rights under the Railway Labor Act which may be involved in the mergers, to forego invoking the limited but important jurisdiction of the ICC or the CAB because to do so is to preclude the possibility of instituting a suit in the federal courts to protect those rights if the ICC or CAB should refuse to provide any relief. And this, even if the federal court suit is, as in the instant case, based upon Railway Labor Act claims far broader than anything the administrative agency could have dealt with if it wanted to. And if the employees first institute action in the federal courts they will be met with the claim of "primary jurisdiction" or failure to exhaust administrative remedies. The importance of a decision by this Court which removes this "Hobson's choice" needs no further emphasis.

The decision below, also throws into complete confusion the entire problem of the relationship between the federal courts and the administrative agencies in areas where there is concurrent jurisdiction. Let us take one illustration that is currently very important. Under Section 8(b)(4) of the Labor-Management Relations Act (29 U.S.C. 158(b)(4)) certain "secondary" conduct by a labor organization is made an unfair labor practice subject to the jurisdiction of the National Labor Relations Board. Under Section 303 of the same Act (29 U.S.C. 187) the identical conduct is made subject to a suit for damages in a federal court. The decision of the court below would stand for the proposition that one who has filed a complaint before the Board, and for any reason failed to obtain the relief requested and within the jurisdiction of the Board to

grant may not thereafter file suit in the federal court, for such suit would be a "collateral attack" on the Board's order.[5] Such a result makes meaningless the whole concept of concurrent jurisdiction. Exercise by this Court of its supervisory powers to remove the cloud which the decision below places upon this important aspect of federal jurisdiction is clearly indicated.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEP 1 1965

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[5] Such a result conflicts directly with the decisions of the Sixth Circuit in *United Brick Workers* v. *Deena Artware, Inc.*, 198 F. 2d 637, (CA 6) and *NLRB* v. *Deena Artware, Inc.*, 198 F. 2d 645 (CA 6), Cert. denied, 345 U.S. 906, where the Court affirmed a district court determination as to whether as a matter of law certain conduct constituted prohibited secondary activity which was contrary to that found by the Board.

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1964, APRIL SESSION, 1965

No. 14914

JOHN J. OLING, DAVID J. LANDRY, on behalf of themselves and all other "second officers" in the employ of the United Air Lines, Inc. similarly situated, *Plaintiffs-Appellants,*

v.

AIR LINE PILOTS ASSOCIATION, and UNITED AIR LINES, INC., *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 4, 1965

Before DUFFY, CASTLE and MAJOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* This action was brought for injunctive relief, alleging conduct by defendants in violation of the Railway Labor Act (45 U.S.C.A. Sec. 151 *et seq.*), and for damages suffered by plaintiffs as a consequence thereof. On September 29, 1964, United Air Lines, Inc. (United) filed a motion, supported by affidavit and brief, to dismiss the complaint "for lack of jurisdiction and for failure of plaintiffs to state a claim upon which relief could be granted." Plaintiffs filed a brief and affidavits in opposition thereto. The District Court, by order dated November 16, 1964, granted defendants' motion to dismiss. From this order plaintiffs appeal.

Defendant United is a common carrier by air, engaged in interstate and foreign commerce, and is subject to the provisions of the Railway Labor Act (the Railway Act) and the Federal Aviation Act (49 U.S.C.A. Sec. 1301 *et seq.*)

(the Aviation Act). Defendant Air Lines Pilots Association (ALPA) has at all times since May 31, 1961 been the certified bargaining representative at United for a single craft or class of employees, consisting of all members of the flight deck crew, including pilots, co-pilots and flight engineers. Prior to May 31, 1961, ALPA represented only the pilots and co-pilots at United, the flight engineers being separately represented by the UNA Chapter, Flight Engineers International Association, AFL-CIO (FEIA). On January 17, 1961, the National Mediation Board (NMB) decided that United's entire flight deck crew constituted a single craft or class for purposes of collective bargaining under the Railway Act.[1] Thereupon, ALPA was elected and later certified as the representative of that craft or class.

Plaintiffs Oling and Landry, on behalf of themselves and others similarly situated, allegedly represent a group of about 233 employees of United who are classed as "second officers," which classification refers to those flight deck crew members who perform the work of a "flight engineer." They comprise only a portion of such officers in the employ of United. Prior to 1961, the second officers had been represented for collective bargaining with United by FEIA in a bargaining unit confined to flight engineers. Plaintiffs had been members and officers of that union. ALPA had been the bargaining representative of the pilots (or "captains") and co-pilots (or "first officers"). A controversy had long existed between plaintiffs and ALPA as to the proper representation of the former, which culminated in the decision of NMB above noted. Thus, while as a result of that decision ALPA became the exclusive bargaining representative of all pilots, co-pilots and flight engineers in the employ of United, including plaintiffs, the latter refused to become members.

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[1] This decision was upheld by the Court of Appeals for the District of Columbia, UNA Chapter, *FEIA* v. *NMB*, 294 F. 2d 905.

Capital Air Lines, Inc. (Capital) was also an air carrier subject to the provisions of the Railway Act and the Aviation Act. All of Capital's pilots, co-pilots and flight engineers were represented by ALPA for purposes of collective bargaining.

On August 11, 1960, United and Capital entered into an agreement by the terms of which Capital was to be merged into United. The agreement was subject to approval by the Civil Aeronautics Board (CAB or the Board), and upon execution of the agreement proceedings were commenced by United to obtain CAB approval. CAB, after hearing and pursuant to Sec. 408 of the Aviation Act (49 U.S.C.A. Sec. 1378), entered an order dated April 3, 1961, approving the merger. This order was later affirmed by the Court of Appeals for the District of Columbia, *Northwest Air Lines, Inc. et al.* v. *CAB et al.*, 303 F.2d 395.

Included in the terms of the merger order were a number of labor protective provisions ordinarily imposed by CAB upon a surviving carrier to protect employees against possible adverse effects resulting from the merger. Sec. 3 of such provisions (pertaining to seniority integration) provided:

> "Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13."

Section 13 provides that in the event of the failure of the parties to agree, the controversy "may be referred by either party, to an arbitration committee for consideration and determination." CAB reserved jurisdiction "to make

such amendments, modifications and additions to the labor protective conditions imposed by paragraph 2 (c) above as circumstances may require."

On June 1, 1961, the effective date of the merger, the employees of Capital became those of United, with ALPA as the duly certified bargaining unit. Following approval of the merger, ALPA began to implement its own established procedures for formulating an integrated seniority list for all flight deck personnel on the merged carrier. Pursuant to these procedures, representatives were chosen by ALPA from among the employees at each of the affected airlines for the purpose of compiling a single seniority list. Such representatives were unable to resolve their differences concerning seniority integration through negotiation and mediation, and the matters in question were submitted to arbitration in accordance with the procedure set forth in ALPA's Policy Manual.

Two arbitration proceedings were held, the first before an arbitration board headed by Harry Abrahams (the Abrahams arbitration) and the second before an arbitration board headed by David L. Cole (the Cole arbitration). United was not a party to either of these proceedings. The Abrahams award established a seniority integration list for the employees of United, including those employed by Capital previous to the merger, but the matter of integrating United flight engineers into the seniority list was left for determination by the Cole arbitration as ALPA had not been certified as their representative until subsequent to the commencement of the seniority integration procedures.

The award of the Cole arbitration, issued on August 24, 1962, resolved the seniority status of United's flight engineers, respecting their bidding rights to the pilot and co-pilot seats on United aircraft. The award stated:

> "There are really three points of view presented at our hearings—(1) those of the Capital group, (2) the United pilots and second officers, and (3) that of a

> group of older flight engineers who have opposed affiliation with ALPA over the years, [and who have opposed] * * * all moves designed to blend the flight engineer and pilot functions into one category. These are referred to as the career flight engineers, some 244 in number."

The third group, referred to as the "career flight engineers," are those allegedly represented by plaintiffs in this proceeding. They presented their views to the Cole board through their representatives, who made opening and closing arguments and submitted written statements as evidence. In essence, their position was that they were entitled to full seniority credit as pilots for time spent as flight engineers when they had no seniority rights to piloting positions. The Cole board rejected their contentions and stated its reasons therefor, concluding as follows:

> "For these reasons I shall fully protect the rights of the professional flight engineers to the third seat assignments, but I see no equitable basis for placing them on the pilot seniority list ahead of others already on the list or clearly entitled to be on list."

In the period following the arbitration proceedings plaintiffs protested to United that the awards as they related to seniority were unfair and should not be agreed to. However, in June 1963, United and ALPA executed an agreement embodying the awards. The complaint alleged that United accepted without challenge the resolution of the seniority issue.

On November 27, 1963, plaintiffs petitioned CAB to set aside and vacate the integrated seniority list and for other relief, in an effort to obtain their claimed additional seniority rights. They alleged that the Board's jurisdiction to grant such relief was predicated on Sec. 408 of the Aviation Act, upon the Board's own reservation of jurisdiction in the merger order to amend, modify or add to

the labor protective provisions "as circumstances may require," and upon its labor protective provision directing the "integration of seniority lists in a fair and equitable manner * * *."

The petition prayed that CAB open the United-Capital merger case for a hearing respecting petitioners' claim that United and ALPA had failed to integrate seniority "in a fair and equitable manner"; vacate the integrated seniority list agreed to between United and ALPA on June 11, 1963; order United and ALPA to refrain from giving effect to that list, and require that petitioners be given the same credit toward pilot and co-pilot seats as all other members of the flight deck crew.

CAB, on April 24, 1964, gave consideration to the contentions of the parties and to the documentary evidence, including the text of the Abrahams and Cole arbitration awards, and entered an order dismissing plaintiffs' petition. In the order it was stated, "We find no support in the pleadings before us for the relief petitioners request * * *." The Board rejected not only the ultimate request for relief but plaintiffs' factual allegations, upon which relief was sought. Thereupon, plaintiffs, without appealing from such order, commenced the instant proceedings, alleging violations of the Railway Act.

While the parties in their briefs set forth the contested issues in different phraseology, we think they are adequately covered in United's brief as follows:

> "Was the district court correct in dismissing the complaint for lack of jurisdiction and for failure to state a claim upon which relief could be granted either because:
>
> (a) The subject matter of the complaint was before the C.A.B. on a petition filed by plaintiffs and the decision rendered by the C.A.B. with respect thereto could only be reviewed by a United

States Court of Appeals in accordance with the statutory review procedures prescribed by the Federal Aviation Act; or

(b) The C.A.B. had exclusive jurisdiction under the Federal Aviation Act over the subject matter of the complaint thereby immunizing defendants' conduct from the operation of all other laws including the Railway Labor Act."

The jurisdiction of CAB over seniority integration is derived from its merger approval authority under Sec. 408 of the Aviation Act. Although there is no express mention in that section of the Board's authority to prescribe either labor protective conditions or seniority integration procedures, its does provide that CAB shall approve mergers and other related transactions "upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe * * * unless the Board finds that the * * * merger * * * will not be consistent with the public interest."

We do not understand that plaintiffs challenge the Board's jurisdiction or its authority with respect to the seniority integration provision embodied in its order. Therefore, we cite without extended discussion only some of the cases which sustain that jurisdiction and authority. *United States et al.* v. *Lowden et al.*, 308 U.S. 225, 238; *Western Air Lines, Inc.* v. *Civil Aeronautics Board*, 194 F.2d 211, 213-214; *Kent* v. *Civil Aeronautics Board*, 204 F.2d 263, 265; *Outland et al.* v. *Civil Aeronautics Board*, 284 F.2d 224, 228, and *Brotherhood of Locomotive Engineers* v. *Chicago and North Western Railway Co.*, 314 F.2d 424, 429.

Not only have the courts consistently held that the Board has the jurisdiction and authority to impose labor protective provisions, including that for seniority integration, as a condition of merger approval but, in Kent, the reviewing

court sustained the authority of the Board to formulate its own integrated seniority list. In doing so it stated (page 265):

> "Industrial strife may arise by reason of a dispute between the two or more employee groups as to how a unified seniority list should be drawn. And when such a dispute develops, it is within the power of the Board to order the carrier to follow whatever course is necessary and appropriate. An overall supervision of the merging carrier so as to protect adequately the public interest is what Sec. 408 (b) of the Act contemplates, and that is what these orders accomplish. The same power to order the initial integration justifies the Board's further requirement that the employer refrain from making any labor contract in the future which will not conform to it."

Thus, we have a situation where the Board acting within its jurisdiction and authority gave its approval to the merger upon condition that certain labor protective provisions be complied with, including that pertaining to seniority integration as provided by the Cole arbitration and as agreed to by United and ALPA.

Section 1006, 29 U.S.C.A. Sec. 1486, provides in material part:

> "(a) Any order, affirmative or negative, issued by the Board or Administrator under this chapter * * * shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed * * * by any person disclosing a substantial interest in such order.
>
> * * *
>
> "(d) Upon transmittal of the petition to the Board or Administrator, the court shall have *exclusive jurisdiction* to affirm, modify, or set aside the order

complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. [Italics supplied.]

* * *

"(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States * * *."

Thus, plaintiffs under this statute were afforded a right to appeal to a United States Court of Appeals for a review of the proceedings by which the seniority list was prepared and accepted by the Board. If they had done so, that Court would have acquired exclusive jurisdiction to consider and determine the merits, if any, of petitioners' assault on the Board's proceedings.

Plaintiffs, now met with the contention that they are not entitled to maintain the present suit because of failure to exhaust their statutory and administrative remedies, state that before bringing the instant suit to remedy the discrimination, and other Railway Act violations, they exhausted their administrative remedies by filing "a petition with the Civil Aeronautics Board seeking relief under the employee protective conditions of the Board's order approving the merger * * *." However, no reason, much less excuse, is assigned for their failure to seek review of the Board's order in accordance with their statutory right.

The cases firmly establish the principle that where Congress has provided a statutory procedure for the review of an administrative order, such procedure is exclusive. A recent case much in point is *Whitney National Bank* v. *Bank of New Orleans & Trust Co. et al.,* 379 U.S. 411. That case involved the Bank Holding Company Act, 12 U.S.C.A. Sec. 1842 (a), particularly Sec. 1848, which provided a statutory procedure for review similar to that in the instant case. Plaintiffs, instead of relying upon such procedure,

sought relief in an independent action which the Supreme Court denied. The Court stated (page 420):

> "* * * where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive. See, *e.g.*, *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507 (1953); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). Congress has set out in the Bank Holding Company Act of 1956 a carefully planned and comprehensive method for challenging Board determinations. That action by Congress was designed to permit an agency, expert in banking matters, to explore and pass on the ramifications of a proposed bank holding company arrangement. To permit a district court to make the initial determination of a plan's propriety would substantially decrease the effectiveness of the statutory design."

The instant case is even stronger against plaintiffs on the point under discussion because here the statute lodges "exclusive jurisdiction" in the reviewing court while in Whitney such jurisdiction was found by implication.

Another case much in point is *Holman et al.* v. *Southern Airways, Inc.*, 210 F. Supp 407, wherein the District Court dismissed the complaint and denied the relief requested on the ground that the suit, couched in the terms of a violation of petitioners' contract rights and of their right to fair representation, was in reality an attempt to review a CAB order. Among other things the Court stated (page 410):

> "This Court is convinced that it does not have jurisdiction to grant the plaintiffs the relief they seek, inasmuch as jurisdiction to review orders of the Civil Aeronautics Board is vested exclusively in the Circuit Courts of Appeals."

On the following page the Court stated:

> "It seems to this Court that if the plaintiffs are dissatisfied with the order of the Board, they could, pursuant to the provisions of 49 U.S.C.A. Sec. 1486, of the Civil Aeronautics Act, procure a judicial review of the order * * *. * * * However, in the face of the expressed intention of the Congress to vest exclusive jurisdiction in the various Courts of Appeals to review orders of the Civil Aeronautics Board, this Court feels that any relief, injunctive or otherwise, must be had either from such Courts of Appeals or from the administrative agency in the whose jurisdiction the proceedings originated—in this case, the Civil Aeronautics Board."

We need not cite other cases which sustain the proposition that CAB has been entrusted by Congress with the power to make determinations affecting the protection of employees in merger cases, including the integration of seniority lists. The CAB has made such a determination here. In plain disregard of the express terms of Sec. 1006 of the Federal Aviation Act which prescribes a direct and exclusive method of review, plaintiffs instituted the present action in derogation of the well settled principle that collateral attacks upon administrative orders are not permissible. See *City of Tacoma* v. *Taxpayers of Tacoma et al.*, 357 U.S. 320, 334-337; *Callanan Road Improvement Co.* v. *United States et al.*, 345 U.S. 507, 512-513; *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 381-382.

Plaintiffs make a strenuous but unsuccessful effort to extricate themselves from their present predicament, which rises from the fact that after invoking the jurisdiction of CAB and obtaining an adverse decision, they failed to pursue their statutory remedy for review. Plaintiffs in their brief state:

> "The claims placed before the Court in the instant suit are broader and different from anything the plaintiffs had placed before the CAB while exercising their responsibility to exhaust all administrative remedies before instituting this suit. [As shown, they failed to pursue their statutory right to review.] The CAB did not have jurisdiction to deal with those claims, and could not, under any circumstances, have provided the kind of relief which plaintiffs must have in order to remedy the Railway Labor Act violations here involved, and which is available to them in a suit in a federal district court."

Plaintiffs assert in their reply brief, "No order has been issued by the CAB which would be negated by the relief plaintiffs here seek." A comparison of the record before the CAB as to the relief there sought with that which they now seek by their complaint demonstrates that this statement is clearly erroneous. True, there are some allegations in the complaint not made in plaintiffs' petition before the Board, but in essence they are the same, although in some instances couched in different phraseology.

A detailed comparison of the two instruments would unduly burden this opinion. We shall thus confine the comparison to some of the more salient features. Plaintiffs in their brief state:

> "One of the principal claims raised by plaintiffs in the complaint is the claim that ALPA has violated the Railway Labor Act (45 U.S.C.A. 151, *et seq.*) by failing in its statutory duty of fair representation, by discriminating against plaintiffs, because of their allegiance to FEIA and for other invidious considerations, in the negotiating of their seniority, wages, and working conditions. As a concomitant of this claim, plaintiffs claim that United has also violated the Railway Labor Act by entering into agreements with ALPA knowing

that those agreements contain terms which were the product of invidious discrimination against plaintiffs."

In their petition before the Board they alleged that "United has failed to integrate the seniority of its employees and the former Capital employees in a fair and equitable manner by refusing to accord petitioners credit for service performed, which service has been credited other employees similarly situated"; that "United has invidiously discriminated against petitioners as a class and has caused petitioners to suffer irreparable injury"; that "ALPA has willfully failed to perform its statutory duty as a collective bargaining agent of representing petitioners, a minority of its members, fairly and without prejudice," and that "United and ALPA have acted in bad faith and in a deliberate effort to subvert an order of the Civil Aeronautics Board which requires integration of seniority in a fair and equitable manner, by discriminatorily distinguishing between petitioners and all other members of the bargaining unit."

The close similarity between the charges made before the Board and those in the instant complaint are apparent. And even more important, the thrust of the relief sought before the Board, as in the instant suit, rests on the premise that the seniority integration approved by the Board was not accomplished "in a fair and equitable manner." The Board found that it was so accomplished and rejected plaintiffs' contentions that United attempted to "subvert" the Board's merger order, that United "invidiously discriminated against petitioners as a class," and that ALPA "willfully failed to perform its statutory duty as collective bargaining agent."

Even more important in comparing the two actions is the request for relief. Before the Board, petitioners requested that it "set aside and vacate the integrated seniority list agreed to between United and ALPA on June 11, 1963," and order them "to cease and desist giving effect in any

manner whatsoever to said integrated list." In the complaint, among other things plaintiffs request the Court "to issue an order declaring null and void and unenforcible in any and all respects Pilots' System Seniority List presently in effect on United, and enjoining ALPA and United from giving effect in any manner whatever to that list."

It can hardly be doubted but that the heart of plaintiffs' contention before the Board, as well as in its complaint, is their request for relief from what they claim was their unfair listing relative to seniority rights. Other allegations in their complaint are merely subsidiary to and offered in support of that principal claim.

The conclusion is inescapable that plaintiffs sought a review of the final order entered by CAB on April 24, 1964. Stated otherwise, their action constitutes a collateral attack upon such order. As we have shown, this is not permissible under the law. For this reason the District Court properly dismissed the complaint. Such being our conclusion, we do not reach the issue as to whether the CAB had exclusive jurisdiction, as argued by defendants, or concurrent jurisdiction, as argued by plaintiffs. In any event, its jurisdiction was invoked and pursued by plaintiffs to the point of an adverse decision, and they failed to seek relief therefrom by a review in the manner provided by Congress.

The order appealed from is

AFFIRMED

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

STATUTORY PROVISIONS INVOLVED

Railway Labor Act, 45 U.S.C. 151 et seq.

Section 2, First, 45 U.S.C. 152, First:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Third, 45 U.S.C. 152, Third:

> "Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

Section 2, Fourth, 45 U.S.C. 152, Fourth:

> "Fourth. Employees shall have the right to organize and bargain collectively, through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or

agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Federal Aviation Act, 49 U.S.C. 1301 et seq.

Section 408(b), 49 U.S.C. 1378(b):

"(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisi-

tion of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe * * *."

Section 1006, 29 U.S.C. 1486:

"(a) Any order, affirmative or negative, issued by the Board . . . under this chapter . . . shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

* * * * *

"(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate."

Section 1106, 49 U.S.C. 1506:

"Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."